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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHAEL H. HUNT, SERGEANT, United States Army, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether the government's use of "on or about" language (e.g., "on or about October 20, 1989") in a criminal charge violates the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution where the accused gives pretrial notice of an alibi defense and the government fails to provide notice of rebuttal witnesses and merely proves a date "reasonably near" the pleaded date.

II

Whether notice of an alibi defense makes the date of the criminal offense a material element which requires the government to affirmatively prove the date pleaded at trial to avoid unfair surprise to the accused in violation of the Fifth and Sixth Amendments of the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Michael H. Hunt, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 37 M.J. 344 (C.M.A. 1993) (Appendix A). The opinion of the United States Army Court of Military Review is reported at 34 M.J. 779 (A.C.M.R. 1992) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .
>
> Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
>
> Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 30, and May 1 and 2, 1990, Sergeant [hereinafter SGT] Michael Hunt was tried at Fort Dix, New Jersey, by a general court-martial composed of officer and enlisted members [hereinafter the jury].[1] Contrary to his pleas, SGT Hunt was convicted of rape, larceny, two counts of assault, adultery, and engaging in conduct of a nature to bring discredit upon the

[1] Court-martial members are analogous to jurors.

Armed Forces, in violation of Uniform Code of Military Justice [hereinafter U.C.M.J.] arts. 120, 121, 128, and 134, 10 U.S.C. §§ 920, 921, 928, and 934 (1988), respectively. The jury sentenced SGT Hunt to a dishonorable discharge, confinement for 14 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted pay grade. On June 22, 1990, the convening authority approved the sentence.[2] On February 28, 1992, the United States Army Court of Military Review [hereinafter Army court] affirmed the findings and the sentence. Thereafter, on August 18, 1993, the United States Court of Military Appeals agreed with the Army court and reaffirmed the findings and the sentence.

Prior to trial, the defense counsel gave notice under Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 701 (b) (1) of an alibi defense for the date listed on the charge sheet.[3] At trial, without prior notice to the defense, the government proved a date other than that alleged in the charge sheet. The defense moved for a directed verdict, noting a fatal variance between the pleadings and the proof. The military judge denied the motion.

On appeal, the United States Army Court of Military Review held that a four week difference between the date alleged and that proved did not mislead the appellant, that the appellant had sufficient notice of the charged incident to defend against it, that the appellant was protected from another trial for the same offense and that the appellant had waived the issue by failing to complain about indefiniteness at trial. The issues of an alibi defense and its effect on the general variance

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[2] The commanding general, who initially convenes the court-martial, is also the accused's first avenue of appeal and clemency.

[3] The charge sheet is the military's functional equivalent to the information or indictment in civilian courts.

rules were never addressed. *United States v. Hunt*, 34 M.J. 779 (A.C.M.R. 1992).

The Court of Military Appeals agreed with the Army court and noted that military practice followed the federal practice when it came to variance law. The only mention of alibi in the court's opinion is the statement that the appellant's "attempt . . . is to no avail." *United States v. Hunt*, 37 M.J. 344, 348 (C.M.A. 1993).

REASONS FOR GRANTING THE WRIT

I. *Overview*

The questions presented in this case are whether, in light of the purpose of requiring notice of an alibi defense, and the due process requirements of the Fifth and Sixth Amendments, allowing the government to prove any date within a few weeks of an "on or about" date is fundamentally unfair when the government is on notice that the accused intends to rely upon an alibi defense. Such a holding effectively precludes any use of an alibi defense even when, as in this case, notice of the defense is given in advance of trial.[4]

The Fifth and Fourteenth Amendments provide that all persons accused by the government of commiting criminal offenses will not "be deprived of life, liberty, or property, without due process of law." Thus, "criminal prosecutions must comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984). *See also Rochin v. California*, 342 U.S. 165, 172 (1952) (governmental conduct which "shocks the conscience" or "offend[s] even hardened sensibilities" violates due process). When the

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[4] In essence, petitioner asks whether the government should be permitted to use the notice of alibi defense as the sword of surprise it expressly prohibited the defense from using by creating the notice rules in the first place.

government "brings its judicial power to bear" on an individual, an accused must be given a meaningful opportunity to present his defense and must be treated fairly and evenhandedly by his accusers. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

This Court has further recognized an accused's Sixth Amendment right to present a defense. *Rosen v. United States*, 245 U.S. 467 (1918). Using *Rosen* as a foundation, in *Washington v. Texas*, 388 U.S. 14, 22 (1967), this Court opined that "the Sixth Amendment was designed in part" to allow an accused the right to defend himself against his accusers. This concept was ratified by this Court in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 54 (1987). More specifically, Justice Powell wrote that due process in a criminal case demands that the accused be given "a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294.

For these reasons, this Court held that the constitutionality of a state imposed "notice-of-alibi" rule was contingent on "reciprocal discovery." *Williams v. Florida*, 399 U.S. 78, 82 n.11 (1970). More specifically, this Court held in *Wardius v. Oregon*, 412 U.S. 470, 472 (1972), that "the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." This Court explained:

> Notice-of-alibi rules, now in use in a large and growing number of States, are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. . . . Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be

> afforded, [citations omitted], it does speak to the balance of forces between the accused and his accuser. . . . This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial.

Id. at 473-74, n.6. The notice-of-alibi rule in the U.S. military, R.C.M. 701(b)(1), provides for reciprocal discovery of government witnesses who will rebut the alibi. R.C.M. 701(a)(3)(B).

II. *Statement of Facts*

The government charged SGT Hunt with raping the alleged victim "on or about 20 October 1989." At the U.C.M.J., Article 32 hearing,[5] the evidence provided by the government was that the date of the rape was consistent with this October 20 date. In fact, the victim testified that the rape occurred 3-4 weeks prior to Thanksgiving. Thereafter, three additional fresh complaint witnesses testified that the rape occurred either around the 20th of October or in October.

After this hearing, where the evidence of the October 20 date was heavily corroborated, the defense counsel gave a Notice of Alibi Defense for the October 20 date under R.C.M. 701(b)(1) to the government. Upon receipt of the Notice, the government did not amend the October 20 date on the charge sheet, nor did it give notice of government witnesses who

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[5] The U.C.M.J., Article 32 hearing has no functional equivalent in the civilian sector, although some scholars have compared it to the preliminary probable cause hearing in felony cases. However, the Article 32 hearing is much broader than an inquiry into probable cause. Whereas in the civilian sector, the prosecutor puts on only limited evidence to establish probable cause, the military prosecutor puts on nearly the entire case. The hearing puts the defense on notice of all key facts which the government intends to prove at trial.

would specifically rebut the alibi. Instead, it proceeded to trial with the full knowledge that the defense was not on notice of a date different from that originally charged.

At trial, without prior notice to the defense and in front of the jury, the government offered evidence which changed the date of the offense to the 26th of September. This change came through the testimony of a government witness who did not testify at the Article 32 hearing and whose prior written statements did not pertain to the rape charge. The victim was then allowed to change her Article 32 testimony at trial to accommodate the new date. Although the trial defense counsel proceeded to put on a viable alibi defense for the 20th of October, the defense became a nullity given the evidence of a distinctly different date of the offense.[6] Hence, the case-in-chief witnesses acted to rebut both the Article 32 testimony of four government witnesses and the date on the charge sheet.

Following the presentation of the evidence, the defense counsel moved for a directed verdict due to a fatal variance between the pleadings and the proof presented at trial. Counsel noted that he was not on prior notice of the new date and had prepared for trial under the assumption that the old date was valid. He argued that the Article 32 hearing had not provided notice of the change and that the new date unfairly destroyed SGT Hunt's sole defense, that of alibi.

The military judge ruled that the government was allowed to prove any date within the statute of limitations because it had chosen to charge petitioner with committing the offense "on or about" a certain date. The October 20 date in the charge sheet was not amended to reflect the date proved at trial.

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[6] Petitioner's alibi defense would have been bolstered by the victim's inability to identify SGT Hunt as her attacker, as well as her numerous inconsistent pretrial statements.

On appeal, the United States Army Court of Military Review held that the variance in this case did not fit within one of the fatal variance criteria noted in *United States v. Freeman*, 23 M.J. 531 (A.C.M.R. 1986), *pet. denied*, 26 M.J. 290 (C.M.A. 1988). The Army court did not address how an alibi defense played into the language of *Freeman*. Aside from *Freeman*, the Army court concluded that the absence of a motion for a bill of particulars had waived the issue. *Hunt*, 34 M.J. at 781-82.

The Court of Military Appeals held that the government is not required to prove an exact date when it chooses to charge an accused with committing an offense "on or about" a certain date. The court relied upon numerous federal and military cases to substantiate its view. *None* of those cases, however, dealt with the effects of an alibi defense on variance law. The court completely ignored petitioner's argument on appeal, choosing not to address the constitutional concerns raised by alibi defenses or the fairness of allowing the government to knowingly lie in wait to sabotage an accused's sole defense. *Hunt*, 37 M.J. at 347-48.

III. *Variance Law and the Alibi Defense in Military and Federal Courts*

The military follows the federal practice of allowing the government to prove any date within the statute of limitations as long as the government has elected to charge an accused with the commission of a crime "on or about" a certain date. *Hunt*, 37 M.J. at 347 (*citing United States v. Brown*, 34 M.J. 110 (C.M.A. 1992); *United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987)). This practice, however, as both military and federal courts point out, is not without its exceptions. *Freeman*, 23 M.J. at 538; *United States v. Goodrich*, 493 F.2d 390, 394 (9th Cir. 1974). Indeed, *Freeman* specifically points out that "there is an

exception to this general rule when time is of the essence to the charged offense." 23 M.J. at 538. Simply put, where the date of the offense becomes material to prove or disprove the case, the government must prove what it pleads.

Numerous courts have discussed the situation when time becomes of the essence. All seem to agree that time is of the essence where the accused "is charged with several similar acts at the same place," or "when it may change the nature of the offense or alter the maximum permissible punishment." *Id.; see also United States v. Duke*, 940 F.2d 1113, 1120 (8th Cir. 1991) (exception where the date becomes a material element of the offense); *United States v. Cochran*, 697 F.2d 600, 604 (5th Cir. 1983) (exception where double jeopardy is an issue). The problem within both the military and most of the federal courts is that none has definitively ruled whether time is of the essence when the defense gives notice of an alibi defense.

The Ninth Circuit held in *Goodrich* that "when an alibi defense is asserted, the time of the crime is extremely material, since any variance in time proved and the time the jury is allowed to find, deprives the defendant of his alibi defense." That case dealt with a situation where the government charged the accused with committing an offense "on" a specific date. 493 F.2d at 393. The distinguishing factor is "on," as opposed to "on or about." This distinction has had specific ramifications in other variance cases; none of those cases, however, dealt with the defense of alibi.

The Third Circuit in *United States v. Somers*, 496 F.2d 723, 746 (3rd Cir. 1973), was tempted, but elected not to address this standard for variance inquiries where alibi is raised. Hence, although that court implied that the standard should change, it made no definitive ruling.

Likewise, the Fourth Circuit noted in *United States v. Covington*, 411 F.2d 1087, 1088 (4th Cir. 1969), that when

"time is of the essence," the general rule allowing the government to prove any date within the statute of limitations is modified. There, the appellant contended for the first time on appeal that he had an alibi defense which was prejudiced by the variance. The court rejected this eleventh hour assertion, but noted that if the appellant had raised this at trial, "a claim of fatal variance prejudicing the preparation of a defense might [be] valid." *Id.* at 1089.

Hence, the question of alibi has not been fully answered by the federal or military courts. **The cases quoted by the Court of Military Appeals to support its ruling are military and federal variance cases, but none deal with the defense of alibi.** For this reason, an inquiry into how the states deal with this issue is required.

IV. *Variance and the Alibi Defense in the State Courts*

State courts center their attention on "materiality." The majority agree that when notice of an alibi defense is given, time becomes a material factor. *See Commonwealth v. Boyer,* 216 Pa. Super. 286, 264 A.2d 173 (1970) (notice of alibi defense makes "time of the essence"); *Deaton v. State,* 242 So.2d at 452 (Miss. 1970) ("time may or may not be of the essence of an offense when an alibi defense is presented, depending upon the circumstances of the particular case"); *State v. Cooper,* 201 P.2d 764, 769 (Utah 1949) ("the issue of time may be very important where the defendant's defense is alibi"); *State v. Pace,* 212 P.2d 755, 759 (Or. 1949) ("time particularly becomes material where an alibi is claimed"); *State v. Whittemore,* 255 N.C. 583, 122 S.E.2d 396 (1961) (time is of the essence where there is an alibi defense); *State v. Severns,* 13 Wash. 2d 542, 125 P.2d 659 (1962) (time is of the essence when the accused has an alibi defense); and *Esquibel v. State,* 399 P.2d 395, 399 (Wyo. 1965) (where an alibi defense was raised, the "time of the offense became critical. It could no longer be regarded as immaterial."). *But see MJS v. People,* 478 P.2d 720

(Colo. App. 1970); and *People v. Smith*, 58 Mich. App. 76, 227 N.W.2d 233 (1975).

Of those jurisdictions which accept that alibi defenses make the date of the offense material, the majority mandate that once notice of an alibi is given, the date charged becomes fixed. As such, the government must prove that date at trial or a fatal variance occurs. *See United States v. Waid*, 92 Utah 297, 67 P.2d 647 (1937) (where the accused has an alibi defense, the government does not have unlimited discretion in proving any date within the statute of limitations, but instead must stick to just one date); *People v. Waits*, 18 Cal. App. 2d 20, 62 P.2d at 1054 (1936) ("in light of the appellant's alibi defense, the time the alleged offenses were committed became material, and it was the duty of the trial court to limit the jury in its consideration of the evidence to the period which the prosecution selected as the time for the commission of the offenses"); *Quillen v. State*, 391 N.E.2d 817 (Ind. 1979) (notice-of-alibi fixes the date of the offense to the date charged)[7]; and *Van Norman v. State*, 365 So.2d 644 (Miss. 1978) (alibi defense fixes the date on the indictment).

The requirement in alibi cases that the government be required to prove the date charged does not vary with the manner in which the government has elected to charge an accused. Hence, it makes no difference whether she or he was charged "on or about" a certain date or simply "on" a specific date. *See Waid*, 92 Utah at 297, 67 P.2d at 647 (charged "on or about"); *Boyer*, 216 Pa. Super. at 286, 264 A.2d at 173 (originally charged "on or about"); *Wilson v. State*, 515 So.2d 1181, 1182 (Miss. 1987) (charged "on or about"); *Whittemore*, 255 N.C. at 583, 122 S.E.2d at 396 (charged "on or about"); *State v. Bowles*, 360 S.W.2d 706, 707 (Mo. 1962) (charged "on or about"); *Esquibel*, 399 P.2d at 395 (charged "on or about"); *State v. Poindexter*, 21 N.C. App. 720, 205 S.E.2d at 145 (1974)

[7] Indiana operates under an Alibi Notice statute which mandates that the government prove the date charged at trial.

(charged "on"); and *Caldwell v. State*, 139 Ga. App. 279, 228 S.E.2d 219, 221 (1976) (charged "on"). The elimination of the distinction between these charging tactics is only logical given the parameters of the Fifth Amendment. The government should not be permitted to "skirt" an accused's constitutional rights through the use of a legal fiction. The reasoning of the state courts is clear: to allow the government to charge one date and prove another when there is an alibi defense deprives an accused of his Sixth Amendment right to present a defense. *Bowles*, 360 S.W.2d at 709; *Poindexter*, 21 N.C. at 720, 205 S.E.2d at 145.

There are, however, a minority of states which, while noting the materiality of the date of the offense, do not find the variance fatal where it occurs. These courts put the onus on the defense counsel to make a motion for a continuance when there is a variance which impinges upon the validity of the alibi. *People v. Cook*, 136 Cal. App. 2d 442, 288 P.2d 602 (1955); *Caldwell*, 139 Ga. App. at 287, 228 S.E.2d at 224. Still other courts put the burden upon the trial judge to *sua sponte* inquire into granting a continuance or mistrial without prejudice to allow the defense time to re-think its defense theory. *State v. Pitts*, 62 Wash. 2d 294, 382 P.2d 508 (1963); *State v. Pierce*, 263 S.C. 23, 27, 207 S.E.2d 414, 416 (1974).

V. *Application to SGT Hunt*

Here, neither the Army court, nor the Court of Military Appeals addressed the true issue—that of alibi. Instead, each chose to rely upon the general variance rule without any analysis into the effect of an alibi defense. This can be seen in the numerous cases these two courts cite as controlling in their respective opinions. **None of the cases cited is an alibi case.** *Hunt*, 34 M.J. at 781-82; *Hunt*, 37 M.J. at 347-48.

As noted, there is no case law in the military dealing with variance and alibi. Federal courts seem to imply that an alibi defense should be one of the exceptions changing the general rule. However, none of the cases expressly holds such.

Where SGT Hunt was denied the opportunity to a fair trial and opportunity to present his defense under the Fifth and Sixth Amendments, it is reasonable for this Court to fill the vacuum in the military and federal courts, while settling the split in the states.

Petitioner asserts that the majority of state courts are correct. Where an accused tenders notice of an alibi defense, time is of the essence, and the government must fix the date it intends to prove at trial. Because the date becomes a material element of the crime, the failure to prove it is fatal. By mandating such a black letter rule, this Court can ensure that the Fifth and Sixth Amendment rights of an accused will be protected from sabotage by the government. To rule adversely would allow the government to surprise an accused. This is the kind of tactic which the notice provisions under *Williams* were meant to curb. Certainly the government should not be permitted to use its discovery of the defense theory to ambush the accused at trial. For this reason, the military mandates reciprocal discovery to comply with *Wardius*.

Nevertheless, in petitioner's case, SGT Hunt gave notice of an alibi defense, thus tipping his strategy to the government. The government, with full knowledge that it had not changed the charged date prior to trial, surprised the defense by changing the date of the offense at trial. It did this by, in effect, having the case-in-chief witnesses act as rebuttal witnesses to the Article 32 hearing. The government did this without reciprocal notice being given to SGT Hunt. This action violates the spirit of *Wardius* and was completely ignored by the military courts. As a direct result, petitioner's sole defense, that of alibi, was stifled. This scenario truly gives meaning to this Court's comment in *Wardius* that "[t]he State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." 412 U.S. at 475.

CONCLUSION

The petition for certiorari should be granted. This Court is now given the opportunity to fill the vacuum created by the federal courts' refusal to address the issue of fatal variances where an alibi defense is raised. This Court can simultaneously settle the conflicting views on this issue within the states. Due process demands that an accused be given a fair opportunity to present his defense. This right cannot exist where the government is allowed to sabotage alibi defenses. The question of an alibi defense and its ramifications on variance law is substantial and of crucial public significance.

Respectfully submitted,

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